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NO. 58943-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re Forfeiture of

ONE 1970 CHEVROLET CHEVELLE.

ALAN and STEPHNE ROOS,

Appellants,

v.

SNOHOMISH REGIONAL DRUG TASK FORCE,

Respondent.

BRIEF OF RESPONDENT

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I. ISSUE

A Hearing Officer found that the claimants failed to prove that they were innocent owners of vehicles that were used for drug trafficking. Is this finding supported by substantial evidence?

II. STATEMENT OF THE CASE

This appeal arises out of consolidated forfeiture proceedings for two vehicles.[1] A 2004 Nissan Sentra, registered to Alan and Stephne Roos, was forfeited based on acts committed on August 16, 2005. 5 Sentra CP 536-37. A 1970 Chevrolet Chevelle, registered to Stephne Roos, was forfeited based on acts committed on September 9, 2005. 2 Chevelle CP 362-63. Alan and Stephne Roos have two sons, Thomas and Jesse.[2] At the time of the acts giving rise to forfeiture, each vehicle was being used by Thomas.

Thomas had been convicted of delivering cocaine in 1998, when he was 16 years old. His sentence included drug treatment. 1 RP 162-63.

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[1] The judicial review of the Chevelle forfeiture was Superior Court cause no. 06-2-07161-0. Review of the Sentra forfeiture was no. 06-2-07162-8. Separate Clerk's Papers were filed in each case. These will be referred to as "Chevelle CP" and "Sentra CP."

[2] Alan and Stephne Roos will be referred to as Mr. and Ms. Roos. They will be collectively referred to as "the claimants." Thomas and Jesse Roos will be referred to by their first names.

In the summer of 2005, Thomas was (in the words of Ms. Roos) "leading a secret life." 2 RP 403. He testified that he "tried to keep everything hidden" from his parents. He tried not to come home. If he did go home, he would try to leave before anyone saw him. 1 RP 135-36. Mr. Roos had given Thomas permission to drive the Sentra. 2 RP 492.

On June 10, 2005, Lynnwood Police Officer Dennis Fuhrman responded to the report of an unresponsive person in a car. He found Thomas in the driver's seat of the Sentra, slumped against the headrest. A search of the car uncovered 40 oxycodone tablets, various other drugs, and $21,406 in cash. 1 RP 10-14; Sentra ex. 11.[3] Police also found a notebook that listed names and amounts of money owed. Sentra ex. 11 at 225. The arresting officer testified that this kind of book is used by drug dealers to keep track of who owes them money for drugs. 1 RP 26. When Thomas was asked where he got the cash, he responded, "If I tell you where I got it, you will think I am some big time drug dealer." 1 RP 18.

[3] The exhibits from the administrative hearing are included in the "Transcript of Original Hearing Records." In the Chevelle record, this document is 1 CP 19-200 and 2 CP 201-350. In the Sentra record, this document is 1 CP 19-200 and 2 CP 201-363. Most of the exhibits are the same in both records, but a few are not.

Thomas was arrested and booked into jail. The Sentra was impounded. A notice of impound was mailed to Mr. Roos. 1 RP 23-27. (This notice was found in Thomas's possession at the time of the July 3rd arrest. 1 RP 231.) Thomas got a friend to bail him out of jail. He obtained release of the Sentra from impound by forging his father's signature. 1 RP 79-82. Both Mr. and Ms. Roos testified that they did not learn of this arrest until later. 2 RP 209-10, 490-91.

On July 3, Thomas was arrested while driving a Chevy Tahoe belonging to a friend. Sentra ex. 28. On searching the vehicle, police found over $17,000 in cash, a "large amount" of white power that appeared to be cocaine, 100 oxycodone pills, and various other controlled substances. Sentra ex. 29. Police also found a licensing renewal notice for the Sentra, addressed to Alan and Stephne Roos. This notice bore the handwritten notation "For Tom." 1 RP 232; Sentra ex. 18.

Following the arrest, Ms. Roos arranged to have bail posted. She testified that she understood the charges to be possession and negligent driving. 2 RP 427. Thomas told her that he "just had a little bit of stuff that [he] was using." 2 RP 414. At this time, she also found out about the June 10th arrest. 4 RP 447.

Notwithstanding this knowledge, she and Mr. Roos continued to allow Thomas to use the Sentra. 2 RP 450, 501.

On August 16, a police officer on patrol saw Thomas in a 7-11 parking lot, behind the wheel of the Sentra. He was unconscious, slumped over the steering wheel. The car engine was running. On searching him, police found a bag containing 109 grams of cocaine, another bag containing 17 oxycodone tablets, and $6,797 in cash. 2 RP 262-65; Sentra ex. 35.

Jesse Roos happened to drive by while his brother was being arrested. He immediately went home and told his father. Mr. Roos drove to the 7-11 and talked to one of the officers there. The officer showed Mr. Roos the items that had been seized from Thomas. He told Mr. Roos "this is a brick of cocaine or whatever, and your son is in big trouble." 2 RP 499-500. On returning home, Mr. Roos told his wife that the Sentra had been seized and "quite a lot" of drugs were involved. 1 RP 448-49.

On September 9, Thomas was arrested a fourth time. Once again, police found him in a 7-11 parking lot, slumped unconscious over a car steering wheel. This time, he was in a 1970 Chevrolet Chevelle that was registered to his mother. 1 RP 205-06. On

searching him, police found 37 oxycodone tablets and $1,500 in cash. 1 RP 211; Chevelle ex. 26.

Ms. Roos had previously asked Thomas to get the Chevelle repaired. She and Mr. Roos both testified that, on September 9, they thought the car was still in the shop. 2 RP 434-35, 521. Thomas testified that he picked up the car without permission. 1 RP 100. Ms. Roos had, however, made contrary statements in her request for a forfeiture hearing:

> We let our son, Thomas E. Roos, use the [Chevelle] to go to appointments. On 9-08-05 he took the car to show to a friend. Prior to that, the car had been in storage for three months.

Chevelle ex. 2.

The Snohomish Regional Drug Task Force sought forfeiture of both vehicles. Chevelle ex. 1; Sentra ex. 1. Mr. and Ms. Roos requested hearings. Chevelle ex 2; Sentra ex. 2. A consolidated hearing was held as to both forfeitures. The Hearing Officer rejected the claims of "innocent ownership." As to both vehicles, he found that the claimants knew or should have known that Thomas was using their cars to traffic in drugs. As to the Chevelle, he did not credit the testimony that Thomas was using the vehicle without permission. He therefore ordered forfeiture of both vehicles. 2

Chevelle CP 371-74; 5 Sentra CP 945-48. On petition for review, the Superior Court affirmed. 1 Chevelle CP 8-10; 1 Sentra CP 8-10.

III. ARGUMENT

A. THE VEHICLE FORFEITURE STATUTE APPLIES TO ANY PERSON WHO ALLOWS HIS OR HER VEHICLE TO BE USED FOR DRUG ACTIVITIES, REGARDLESS OF THE PERSON'S RELATIONSHIP TO THE USER.

The vehicles in this case were forfeited pursuant to RCW 69.50.505(1)(d):

> The following are subject to seizure and forfeiture and no property right exists in them:
>
> . . .
>
> (d) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of [illegal controlled substances], except that:
>
> . . .
>
> (ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent. . .

The underlined language was added by Laws of 1990, ch. 248, § 2.

A separate provision of the statute, *not* involved in this case, deals with forfeiture of real property. RCW 69.50.505(1)(h) allows forfeiture of:

> All real property, including any, right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements, which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance ..., if such activity is not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property. However:
>
> (i) No property may be forfeited pursuant to this subsection (1)(h), to the extent of the interest of an owner, by reason of any act or omission committed or omitted without the owner's knowledge or consent. . .

This provision was enacted by Laws of 1989, ch. 271, § 212.

Under this statute, there is a critical difference between the forfeiture of real property and that of vehicles. For real property, the statute requires that the property be used for the "manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance." The statute thus generally requires activities that are commercial in nature. For vehicles, however, forfeiture is available if the property was used to facilitate the *receipt* of illegally controlled substances. The receipt of drugs is often connected with mere possession, not with any commercial activities.

The claimants' brief ignores this distinction. For example, they rely on the legislative findings underlying the 1989 amendment

to the forfeiture statute. Brief of Appellants at 11-12. According to those findings, "the forfeiture of real assets where a substantial nexus exists between the commercial production or sale of the substances and the real property will provide a significant deterrent to crime by removing the profit incentive of drug trafficking." Laws of 1989, ch. 271, § 211. These findings refer to the forfeiture of real property, for which a commercial nexus is required. The legislative findings have nothing to do with the forfeiture of vehicles – particularly not when that forfeiture is based on statutory language that was enacted a year later.

The claimants essentially ask this court to create a "parental" exception to the forfeiture statute. The court should decline to do so. "Where a statute provides for a stated exception, no other exceptions will be assumed by implication." Jepson v. Dept. of Labor & Industries, 89 Wn.2d 394, 404, 573 P.2d 10 (1977). The statutory provision dealing with vehicle forfeiture contains three explicit exceptions: for common carriers, innocent owners, and conveyances used for the receipt of small amounts of marijuana. RCW 69.50.505(1)(d)(i)-(iii). This court cannot re-write the statute to provide additional exceptions.

Nor does the statute provide for any absurd results. It simply requires a form of "tough love": parents of drug addicts must not allow their children to use the parents' vehicles to facilitate the receipt of controlled substances. The same is true of any other relative or friend of any drug user, whether addicted or not. If there is anything unwise about this policy, the change must come from the Legislature. The forfeiture statute was properly applied to the circumstances of this case.

B. THE HEARING OFFICER'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The claimants argue that the evidence was insufficient to support the forfeiture. The Hearing Officer found that both vehicles were used to facilitate drug trafficking. 2 CP (Chevelle) 373, conc. no. 4; 5 CP (Sentra) 947, conc. no. 4. The claimants do not appear to challenge these findings. Rather, the issue is whether they come within the "innocent owner" defense set out in RCW 69.50.505(1)(d)(ii).

The Supreme Court has discussed the "innocent owner" defense in the context of forfeiture of real property. Tellevik v. Real Property Known as 31641 West Rutherford St., 120 Wn.2d 68, 838 P.2d 111, 845 P.2d 1325 (1992). The statutory provision dealing

with the defense is, however, substantially identical for real property and for vehicles. Compare RCW 69.50.505(1)(h)(i) with 69.50.505(1)(d)(ii). "[T]he [forfeiting agency] carries the initial burden of producing evidence to show knowledge and consent, but the claimant carries the burden of persuasion of showing a lack of knowledge and consent." Tellevik, 120 Wn.2d at 89. "Consent" means "failure to take all reasonable steps to prevent illicit use of the [property] once one acquires knowledge of that use." Id. at 86. In a case involving forfeiture of proceeds, this court has upheld a finding of knowledge where the owner "knew or should have known the [property] was illegal proceeds." Escamilla v. Tri-City Task Force, 100 Wn. App. 742, 753-54, 999 P.2d 625 (2000).

The standard governing review of an administrative agency's factual findings is set out in RCW 34.05.570(3)(e):

> The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> . . .
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court. . .

"Substantial evidence" is evidence sufficient to persuade a fair-minded person. Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 833, 125 P.3d 102 (2005). This standard

is "highly deferential" to the agency fact finder. Premera v. Kreidler, 133 Wn. App. 23, 131 P.3d 930 (2006). A determination of witness credibility is "exclusively within the province of the finder of fact." State v. Michel, 55 Wn. App. 841, 844-45, 781 P.2d 496 (1989). The ultimate issue in the present case is whether there is substantial evidence to support the Hearing Officer's finding that the claimants failed to prove their "innocent owner" defense.

1. In Light Of The Claimants' Knowledge Of Their Son's Recent Drug Arrests, There Is Substantial Evidence That They Knew That He Was Using Their Vehicles For Illegal Drug Transactions.

With regard to the Sentra, the claimants concede that they gave Thomas permission to use the vehicle on August 16, 2005, the day of the acts that led to forfeiture. Sentra ex. 2. The issue is whether they had knowledge that he was using the vehicle to facilitate illegal drug activities.

Ms. Roos bailed Thomas out of jail following his July 3rd arrest. According to her testimony, she learned at that time that he had been found in a friend's car with drugs. 2 RP 411-12. Thomas admitted to her that he "had a little bit of stuff that [he] was using." 2 RP 414. She also testified that, on July 3rd, she became aware of his June 10th arrest. 2 RP 447.

Ms. Roos thus admitted that, as of August 16, she was aware that Thomas had been twice arrested for drug offenses during the previous two months. She was aware that, on at least one of these occasions, he was using a vehicle to transport these drugs. Despite this, she and her husband continued to allow Thomas to use one of their vehicles. Based on these facts, a fair-minded fact finder could disbelieve their testimony that they were unaware that Thomas was using their vehicle to facilitate at least the receipt of drugs.

The claimants argue that the "innocent owner" defense would apply if they were unaware that Thomas was using the vehicle to facilitate the *sale or delivery of* drugs. Brief of Appellant's at 17. As already pointed out, the statute also allows the forfeiture of vehicles if they were used to facilitate the *receipt* of drugs. To establish the "innocent" owner defense, the owner must show that the act or omission leading to forfeiture was committed without the owner's knowledge or consent. RCW 69.50.505(1)(d). If the owner was aware that the vehicle would be used to facilitate the receipt of drugs, this defense is not satisfied. The evidence in this case allowed a reasonable inference that the claimants were aware of

that fact. The hearing officer's rejection of this defense is supported by substantial evidence.

2. In Light Of The Claimant's Statement That Her Son Was Using Her Vehicle With Permission, The Hearing Officer Could Properly Disbelieve Her Testimony That He Was Using It Without Permission.

With regard to the Chevelle, the factual issue is different. By the date of the acts leading to the forfeiture of this vehicle, Ms. Roos knew about Thomas's August 16th arrest in the Sentra. She knew that he had "a lot" of drugs on him. She also knew that the police had seized the vehicle. 2 RP 431-32, 448-49. Accordingly, there does not appear to be any dispute that, by September 9, Ms. Roos knew that Thomas was using their vehicles for drug activities. The issue is whether she consented to his use of the Chevelle.

In her testimony, Ms. Roos denied knowing that Thomas was using the car. 2 RP 434. This testimony was, however, contradicted by her statement in the notice of claim:

> We let our son, Thomas E. Roos, use the car to go to appointments. On 9-08-05 he took the car to show to a friend.

Chevelle ex. 2. Based on these contradictory statements, the Hearing Officer could properly find that Ms. Roos's denial of consent was not credible. This credibility determination is within the exclusive province of the fact finder. If the claimant's testimony

is not credible, the fact finder can properly determine that she has not satisfied her burden of establishing lack of consent. Michel, 55 Wn. App. at 845. The Hearing Officer's rejection of Ms. Roos's testimony is supported by substantial evidence.

C. THE CLAIMANTS HAVE NOT ESTABLISHED THAT THEIR ATTORNEY FEES ARE REASONABLE.

The claimants seek attorney fees arising out of the forfeiture proceedings. When claimants substantially prevail in a forfeiture proceeding, they are entitled to reasonable attorney fees. RCW 69.50.505(6). The claimants have not, however, demonstrated that the amounts claimed are reasonable. If this court sets aside the forfeiture of one or both vehicles, the case should be remanded for a determination of reasonable attorney fees.

IV. CONCLUSION

The orders of forfeiture should be affirmed.

Respectfully submitted on March 7, 2007.

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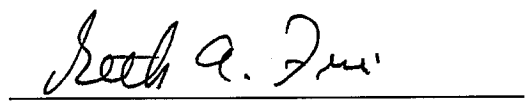
By: 

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